FOR ARGUMENT

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Nos. 85-954 and 85-955

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In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS,

v.

AMERICAN CETACEAN SOCIETY, ET AL., RESPONDENTS

MALCOLM BALDRIGE, ET AL., PETITIONERS,

v.

AMERICAN CETACEAN SOCIETY, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Does the political question doctrine preclude judicial enforcement of a statutory requirement imposed upon the Secretary of Commerce, an executive branch official, in an area which may affect on foreign relations?

2. Where a congressional enactment may have some impact on international relations, is it improper for a court to consider a statute's legislative history in determining Congressional intent?

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BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE

The Speaker and Bipartisan Leadership Group of the House of Representatives respectfully submit this brief as *Amici Curiae* in support of the respondents' position that the decision of the Court below should be affirmed. In an

effort to strengthen the schedules and programs of the International Convention for the Regulation of Whaling ("ICRW"), the Congress deemed it appropriate to enact legislation that would enforce compliance with these otherwise unenforceable international agreements. The resultant statute provides for economic sanctions against any nation that fails to cooperate with the conservation measures adopted by the International Whaling Commission ("IWC"). At issue here is the failure of the Secretary of Commerce to impose the statutorily decreed sanction, a percentage reduction of the noncooperating nation's fishing allocation within the territorial waters of the United States.

The Courts below found that pursuant to the Pelly and Packwood-Magnuson Amendments, 22 U.S.C. § 1978 (1982); 16 U.S.C. § 1821(e)(2) (1982), the Secretary of Commerce was under a mandatory duty to certify Japan as having diminished the effectiveness of the ICRW and, once having certified, was then under an obligation to impose the fishing allocation reduction sanction provided for by law. The District Court's order was stayed pending appeal and after the Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision, this Court granted certiorari.

The petitioners contend that the decision below erroneously interprets the relevant statutory language as depriving the Secretary of Commerce of discretionary authority with respect to such certifications. Petitioners further contend that it is improper for the judiciary to enforce, by the issuance of a writ of mandamus, compliance by executive branch officials with mandatory prescriptions of statutes affecting foreign relations.

INTEREST OF THE AMICI CURIAE

This is a case in which the court below identified "[t]he fundamental question" as "one of statutory interpretation." *American Cetacean Society* v. *Baldrige*, 768 F.2d 426, 432 (D.C. Cir. 1985). Resolution of the questions presented to the Court, however, may implicate Constitution-

al concerns, the importance of which extend far beyond the interpretation of this particular statute. The Speaker and Bipartisan Leadership Group of the United States House of Representatives ("House amici") do not address the proper reading of the statute. Rather than join in the debate on statutory interpretation, the House amici submit their views on two limited, but vitally important, aspects of the case. These two aspects pose, in the considered opinion of the House amici, a significant threat to the vitality of the separation of powers doctrine and to the future proper functioning of our government.[1]

The two aspects which demand the attention of the House amici are novel theories of separation of powers, initially voiced by the dissenting member of the panel of the Court of Appeals and now presented to this Court indirectly by the Executive and more openly by the Japanese petitioners. The first theory is that the judiciary should, as a matter of discretion, refuse to entertain legal actions which seek to mandate executive branch compli-

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[1] Participation by the Speaker and Bipartisan Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., Synar* v. *United States*, No. 85-3945 (D.D.C. Feb. 7, 1986), *appeal pending sub nom. Bowsher* v. *Synar*, Nos. 85-1377, 85-1378, 85-1379 (U.S. oral arg. scheduled Apr. 23, 1986); *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, 607 F. Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985), *appeals argued*, Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985); *Lear Siegler, Inc.* v. *Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984), *appeal argued*, No. 84-2805 (9th Cir. July 10, 1985). In this filing, Speaker Thomas P. O'Neill, Jr., is joined by Majority Leader Jim Wright, Republican Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Republican Whip Trent Lott.

In light of the institutional nature of this participation and the status of the House of Representatives in the government of the United States, it would appear appropriate for the Speaker and elected leadership of the House of Representatives to be permitted to avail themselves of the right to submit a brief as *amici curiae* without the consent of the parties, in accordance with the provisions of Sup. Ct. R. 36.4. In this instance, written consent has, nonetheless, been obtained and copies of the consent letters have been filed with the Clerk of the Court.

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BRIEF FOR THE RESPONDENTS

COUNTER-STATEMENT OF THE CASE

I. THE MODERN DECIMATION OF THE WORLD'S GREAT WHALES

A century and a quarter ago, Herman Melville wondered whether, "Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters." [1] History has borne out Melville's fears. In 1970 the Secretary of

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[1] H. Melville, *Moby Dick* 491 (Macmillan Co., N.Y. 1962) (1st ed. 1851).

the Interior listed eight species of great whales—including the sperm whale of Melville's *Moby Dick*—under the Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969). 35 Fed. Reg. 18,319, 18,320 (1970).[2]

The destruction of the great whales is an event of our age. The masthead lookouts of Melville's day have been replaced by sonar and helicopters, the oared longboats with high-powered catcher ships.[3] The reproductive abilities of the whales, however, remain fixed to a slower biological clock. A female sperm whale evidently can bear one calf every three years; the calf, if it survives, may not reach breeding status itself for ten to thirty years.[4]

The slow reproductive and growth rates of the whales, and the increased killing capabilities of Twentieth Century whaling ships, combined in a predictably tragic fashion. The blue whale, the largest animal known to evolutionary history, merely thirty years ago was thought capable of sustaining an annual catch of about 1,200 animals. Today, scientists believe there are so few of these creatures that males and females may not be able to find each other across the vastness of the oceans.[5] The right whale, so named because its slow swimming

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[2] The term "great whales" is often used to describe the ten largest species of the order Cetacea that have been, or are now, commercially hunted. Most species are classified as "baleen" whales because of the large plates of baleen (or "whalebone") through which the animals filter their diet of small, shrimp-like crustaceans and other small marine organisms; only one of the great whales, the sperm whale, is a toothed whale. *See* S. McVay, *The Last of the Great Whales*, 215 *Scientific American* 13, 14-15 (1966).

[3] *See generally*, J. Tonnessen, A. Johnsen, *The History of Modern Whaling* 609-37 (1982); Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment*, (Part One) 6 Ecology L.Q. 323, 359 & nn.175 & 176 (1977).

[4] Scarff, *supra*, n.3, at 335 & 337.

[5] G. Small, *The Blue Whale*, 70-71 (1970).

once made it the "right" whale to kill, has had to be protected by a complete moratorium since 1940. Most of its scattered groups have not appreciably increased for the past forty years.[6]

II. THE INTERNATIONAL EFFORT TO REGULATE WHALING

The International Convention for the Regulation of Whaling ("ICRW" or "Convention"), which created the International Whaling Commission ("IWC"), was signed in 1946 and entered into force on November 10, 1948. In its early years, the IWC served as little more than a cartel to stabilize whale oil prices (J.A. 150).[7] This was accomplished in the 1950's and 1960's through the establishment of overall yearly quotas, expressed in terms of "blue whale units," which allowed member nations to kill freely whichever species they chose. *See* 62 Stat. 1716, 1724 (1946). The result was biological disaster. Yet, despite repeated warnings from scientists during these decades that whale populations had reached dangerously low levels,[8] the IWC was paralyzed. When conservation amendments were adopted, the amendments had no sanctions. Resistant members could file objections,[9]

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[6] *Id.* at 3-4; NOAA, 46 Marine Fisheries Review, No. 4 at 43 (1984).

[7] "J.A." and "A.A." refer to the Joint Appendix and the Appellees' Appendix filed in the Court of Appeals, copies of which have been lodged with the Clerk of this Court. "Pet. App." refers to the appendix to the petition for certiorari in No. 85-955. "Fed. Br." refers to the brief filed in No. 85-955 by the Federal Petitioners. "J.W.A. Br." refers to the brief filed in No. 85-954 by the Japan Whaling Association, Petitioners.

[8] *See, e.g.*, N. Mackintosh, *The Stocks of Whales* 180 (1965); Scarff, *supra* n.3, at 358-66.

[9] In 1964, the IWC voted to protect the blue whale in the Antarctic. Japan objected. Other nations followed its lead. Scarff, *supra* n.3, at 364. The protection effort collapsed.

or even withdraw temporarily from the Convention, with impunity.[10]

It was not until the early 1970's that the IWC began to shift toward quotas for individual species and abolished the blue-whale-unit system. *Circular Communications to All Contracting Governments*, Oct. 5, 1972, 23 U.S.T. 2820. By that time several species of the world's largest whales, including the blue and humpback whales, had been driven to "commercial extinction"—their numbers so decimated by unrestrained slaughter that it was no longer economical to hunt for them (J.A. 148, 127).

III. THE DETERMINATION OF THE U.S. CONGRESS TO SUPPORT IWC QUOTAS—THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS

The Congress of the United States was in the forefront of the drive for effective whale conservation through the instrumentality of the Convention. At the outset, it authorized and established the principles governing United States participation in the Convention, and provided for the appointment of the Commissioner. Whaling Convention Act, 48 Stat. 2090, 16 U.S.C. § 916 *et seq.* (Aug. 9, 1950). In 1971, both the House and the Senate passed resolutions calling for an international whaling moratorium. S.J. Res. 115, 92nd Cong. 1st Sess. (1971); H.Con. Res. 387, 92d Cong., 1st Sess. (1971). *See* 117 Cong. Rec. 38,537-40 (1971). And in reaction to the devastation of the great whales—and to the collapse of the Atlantic salmon—Congress also adopted the 1971 Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978. Congress' intent was plain from the beginning. It was determined to put teeth into the international control of whaling through the Convention process; it explicitly rejected the methods of bilateral diplomacy, with their traditional tradeoffs and compromises.

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[10] Japan withdrew temporarily from the Convention in 1959 over quota disagreements. Scarff, *supra* n.3, at 361 & n.196.

Under Pelly, so far as the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified. In each instance, quota violations were determined by the Executive Branch to "diminish the effectiveness" of the International Whaling Convention.

In 1974, the Secretary of Commerce made the first certifications under the Pelly Amendment (J.A. 168-72). Both Japan and the Soviet Union had objected, as permitted by the Convention, to an IWC total quota of 5,000 minke whales for the 1973-74 Antarctic season (J.A. 170). When the Soviet Union took 4,000 minke whales and Japan took 3,713, the Secretary certified that both countries had acted to "diminish the effectiveness" of the IWC program. *Id.* President Ford made clear in his subsequent message to Congress that a taking of whales in excess of IWC quotas would bring the Pelly Amendment into play:

> Objections to adopted quotas are permitted by the terms of the Convention. An objecting country is not legally bound by the quota. Whether or not the objection is legal, however, does not alter the fact that *exceeding the quotas will diminish the effectiveness of the program. It constitutes a prima facie case for application of the Pelly Amendment.*

White House Press Release, January 16, 1975 (J.A. 175) (emphasis supplied).

In late 1978, the Secretary of Commerce certified Chile, Peru and the Republic of Korea for exceeding IWC quotas. Letter from Secretary of Commerce to the President (Dec. 14, 1978) (J.A. 177-86). None of the three countries were IWC members at the time. *Id.* The threatened imposition of Pelly Amendment sanctions brought commitments from all three nations to join the IWC by the next annual meeting. President's Report to Congress on the Certification of Chile, Peru and the Republic of Korea, at 3 (J.A. 193, 195).

Yet Congress was not satisfied. The President had exercised his discretion in all five cases to withhold the import ban. See 22 U.S.C. § 1978(a)(4). Congress wanted automatic certification *and* automatic sanctions. So it determined to close the loophole in Pelly by the Packwood-Magnuson Amendment, 16 U.S.C. § 1821(e)(2). Its object was bold. It wanted nothing less than to stop whaling in derogation of IWC quotas everywhere in the world.

As the Packwood-Magnuson hearings and debates make crystal clear, Congress knew what it was doing. It realized it would affect United States relations with other countries by cutting off the Executive Branch's ability to compromise whale conservation in the interest of other foreign policy concerns. Indeed, this was Congress' avowed purpose. Packwood-Magnuson was a conscious decision by the Legislative Branch sharply to limit the discretion of the Executive in order to ensure the effectiveness and integrity of the Convention process.

The Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, § 405, 93 Stat. 395, 403 (1979), was approved on the same day as the Packwood-Magnuson Amendment, Pub. L. No. 96-61, 93 Stat. 407 (1979). In the first, Congress again asked the IWC to agree to a "moratorium on the commercial killing of whales." 93 Stat. 403. Pub. L. No. 96-60 identified several foreign countries, including Japan, as offenders against the effort to stop whaling and urged them to comply voluntarily with the moratorium. 93 Stat. 404.

Packwood-Magnuson was a companion piece to the declaration in Pub. L. No. 96-60. It made clear that there would be a price to nations which chose not to comply with IWC quotas—the loss of fishing privileges in the fishery conservation zone off the coasts of the United States.

IV. THE IWC MORATORIA

Congress acted none too soon. By the 1970's, it had become apparent that the long-term effects of earlier whaling had been even more devastating than anticipated, and that too little was known about how—or even whether—the remaining populations could manage to survive.[11]

A. The Sperm Whale Ban

The ominous gaps in man's knowledge of whale demographics was most evident in the case of the Western Division Stock of North Pacific sperm whales—the very stock harvested to this day by the Japanese under the Baldrige-Murazumi agreement at issue here. As early as 1971, the IWC's Scientific Committee concluded that existing population models were flawed and that in fact the male sperm whale population had fallen to levels at which there appeared to be "little or no further surplus." [12] In 1976, the Scientific Committee was unable to establish firm quotas for male sperm whales; [13] based on the fragmentary data that did exist, the IWC adopted an interim "zero" quota for adult males and allowed a limited harvest of 763 adult females.[14] In 1979, the lack

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[11] It became increasingly suspected, for example, that whales belonging to different stocks and sub-populations of one species did not interbreed, thereby making the overall number of whales of one species a crude and misleading measure of reproductive potential. *See, e.g.*, Scarff, *supra* n.3, at 334-35 and nn.26-28.

[12] 22nd Annual Report, Int'l Whaling Comm'n, Scientific Committee, Summary and Recommendations to the Commission, Section B, ¶¶ 7, 9 (1972).

[13] 28th Annual Report, Int'l Whaling Comm'n, Chairman's Report ¶ 9(ii)(c) (1978).

[14] *Ibid.* These interim quotas stood in marked contrast to the quotas established only several years earlier: 4,000 males and 6,000 females. See 24th Annual Report, Int'l Whaling Comm'n, Appendix III, Chairman's Report ¶ 18 (1974).

of validated population models and apparent reductions in pregnancy rates led to a "zero" quota for females [15] and to a proposal, which failed of adoption, for a three-year moratorium in light of the "scientific uncertainty and the amount of biological material still remaining to be analyzed." [16]

In 1981, the IWC finally voted to reduce the quota for the Western Division Stock of North Pacific sperm whales from 890 adult males to zero adult males (J.A. 65a). It also voted to amend the Schedule to provide that no sperm whales could be taken from the North Pacific Stock in any future year unless the IWC acted to establish a quota for that year.[17]

The vote on these proposals was 25 to one, with Japan casting the only vote in opposition (J.A. 129).[18] Japan then filed its formal objection to the amendment.

B. The General Moratorium

The lacunae in biological information made the determination of sustainable yields unreliable for other species as well.[19] Yet, during the 1970's, the IWC continued

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[15] 30th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 10.2 (1980).

[16] *Id.* at ¶ 10.

[17] Under previous IWC procedure, the absence of a quota for a particular year ordinarily would mean either that whaling for that species or stock was unrestricted or that the previous year's quota remained in effect.

[18] *See Review of the 33rd International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 11 (1981).

[19] A case in point involved Bryde's whales. In 1975 the Scientific Committee drew attention to the critical lack of information on Bryde's whales in the North Pacific—a stock now open to Japanese hunting under the Baldrige-Murazumi exchange. 27th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 8 (1976). In 1976 and

to permit the taking of species and individual stocks under specific numerical quotas. Although the quotas were a desperately needed improvement over the disastrous blue-whale-unit system, there developed a growing concern that even scrupulous adherence to the quotas could not guarantee the long-term survival of the whales.

At its July 1982 annual meeting, therefore, the IWC took the supreme, culminating regulatory step. It ordered a moratorium on all commercial whaling, which had been long sought by the Congress, to commence in 1986. A three-year phase-in was allowed, in a major concession to accommodate the objections of the whaling nations.[20] And as a further compromise, Japan was granted a two-year relief period—for the 1982-1983 and 1983-1984 seasons—from the IWC's decision in 1981 to ban sperm whaling in the North Pacific on the Western Division Stock.[21]

1977, the IWC was forced to set a "zero" quota for Bryde's whales in the Southern Hemisphere "pending a satisfactory estimate of stock size." 28th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 9(i)(d) (1978); 29th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 11(i)(d) (1979).

[20] Dr. John Byrne, the Administrator of NOAA and U.S. Commissioner to the IWC at the time, stated that the IWC "went to considerable lengths to ease the problems which cessation of whaling would bring to the whaling nations. Not only was the starting date set for 1986 (the '85-'86 Antarctic season), but it was agreed to review the situation in 1990 to determine whether it is workable." 8 *Marine Mammal News*, No. 7, at 2 (July 1982). *See* United States Marine Mammal Comm'n, Annual Report to Congress, Calendar Year 1982, at 24.

[21] The United States Marine Mammal Commission described the "compromise" nature of Japan's two-year sperm whaling allocations in its 1982 Report to Congress, *id.* at 25; *see also Review of the 34th International Whaling Comm'n Meeting, Hearings before the Subcomm. on Human Rights and Int'l Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 17-18 (1982) (committee staff report).

The IWC's moratorium was described by NOAA Administrator Byrne as "unmatched in the [IWC's] history" and as the "best evidence we could have that whales will receive that protection we have urged for so long." [22]

On October 21, 1982, Japan filed its objection to the moratorium.

V. JAPAN'S DEFIANCE OF THE IWC'S DECISION AND THE UNITED STATES' RESPONSE

A. Secretary Baldrige's Position Prior to November 1984

Japan continued to take sperm whales in the 1982-83 and 1983-84 seasons. Its objection to the original ban remained in effect. Japan gave every indication of defying the decision of the international community to desist from further whaling. Accordingly, on June 28, 1984, as the 1984-85 sperm whale "season" drew near, Senator Robert Packwood wrote to Secretary Baldrige seeking assurances that the Secretary would certify any commercial whaling that occurred after the IWC moratorium took effect (J.A. 197). Secretary Baldrige responded that certification would be forthcoming, "since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC." (J.A. 198). Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984).

B. Mr. Baldrige's Deal with Japan

The Secretary changed his mind, however, in less than four months. In the November 13, 1984 Baldrige-Murazumi exchange he agreed not to certify just such a "foreign government." Altogether, his letter constituted a special license to Japan to kill 1,200 sperm whales from

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[22] Statement of Hon. John V. Byrne, *Review of the 34th IWC Meeting, supra* n.21, at 31-32.

the protected Western Division stock between 1984 and 1988, and untold thousands of minke and Bryde's whales, all in palpable violation of the IWC decision.[25]

The step was without precedent. Never before had an Executive Branch official purported to suspend the operation of Pelly or Packwood-Magnuson as to an admitted violation of any whaling quota—and certainly not with respect to the supreme regulatory act of a worldwide moratorium.

In exchange for the Secretary's forbearance, Japan agreed to withdraw its objections—effective 1988—to the IWC's 1981 sperm whale ban and 1982 general moratorium (Pet. App. 102a-119a). But contrary to petitioners' representations, Japan did *not* agree to "dismantle its commercial whaling *industry*" (Fed. Br. 13). It is already pressing to ensure that the IWC completes its reevaluation, as contemplated in the IWC Schedule par. 10(e), by 1990, in the evident hope that the moratorium on commercial whaling may come to an end and its "industry" continue. Even as to interim whaling between 1988 and 1990, it is by no means certain that Japan's "industry" will be shut down. Within weeks of the Baldrige-Murazumi agreement, Japan proposed to an IWC Working Group a new category of sperm and Bryde's whaling off its coast that would be called "coastal subsistence whaling" instead of "commercial"

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[25] Federal Petitioners' argument (Fed. Br. 43 n.50) that the killing of these whales is a "prudent price to pay" has little factual support. The IWC's Scientific Committee, so heavily relied on by petitioners (Fed. Br. at Addendum II), concluded that it was "unable to agree on what the long term effects" on the sperm whale population were likely to be. Yet it is precisely such long-term effects that are of crucial concern to a species listed as endangered with worldwide extinction. See Respondents' Motion to Expedite, 85-954, 85-955, Exhibits B & C. It is significant that petitioners fail to offer even short-term comfort from the Scientific Committee as to Japan's killing of 357 Bryde's and 1,941 minke whales during each of the 1986 and 1987 seasons.

whaling and hence not be covered by either the 1981 sperm whale ban or the 1982 general moratorium. *See* Brief in Opposition to Petition for Writ of Certiorari. Nos. 85-954, -955 at 4 n.2. And Japan may well issue itself a permit for "scientific" whaling, as it has in the past, *see Scarff*, *supra* n.3, at 356 n.157, and as to which there is no control under the Convention. Moreover, Secretary Baldrige has already stated that fishing activity by United States citizens is expected to increase considerably by the end of the decade, displacing foreign fishing in U.S. waters (J.A. 111). Thus, Japan will have far less to lose from invocation of Packwood-Magnuson in 1988 than it does today.

As the Baldrige-Murazumi agreement was being negotiated, respondents, a consortium of twelve nonprofit conservation and animal welfare organizations and one individual, filed this complaint. On March 5, 1985, the district court ordered Secretary Baldrige to fulfill his statutory obligations and to certify Japan (Pet. App. 56a-84a). On August 6, 1985, the Court of Appeals affirmed (Pet. App. 1a-55a).

SUMMARY OF THE ARGUMENT

The controlling issue is whether under the 1979 Packwood-Magnuson Amendment the Secretary of Commerce may determine that Japan's refusal to abide by the IWC's worldwide moratoria did not diminish the effectiveness of the Whaling Convention.

The plain language of the statute is otherwise; a flagrant violation of the IWC's moratoria, the supreme and culminating regulation of commercial whaling, must by definition diminish the Convention's effectiveness. The Executive Branch has told the courts that even lesser quota violations would. Respondent Baldrige himself has written the author of Packwood-Magnuson that he agrees.

That Amendment was enacted against a background of administrative practice under the Pelly Amendment that quota defiance consistently triggered automatic certification. Congress, in enacting Packwood-Magnuson, sought and obtained from the Department of Commerce assurance that such defiance would continue to be certified as "diminishing the effectiveness of the Convention." The central purpose of Packwood-Magnuson was to eliminate the loophole in the Pelly Amendment to which the Executive Branch had regularly resorted to withhold sanctions from certified countries—not to create a new loophole. The Executive plea at the time for "some flexibility to respond proportionally to the nature and scope of the particular offense" was rejected. Respondent Baldrige's contention now that he has discretion to withhold sanctions is an effort to confer on himself the very discretion his predecessor sought and was denied when Congress passed Packwood-Magnuson. The use of the phrase "diminish the effectiveness" in other statutes supports Congress' intention in Packwood-Magnuson.

The Secretary also suggests, as a fallback, that the courts should desist from enforcing even an unqualified congressional mandate if that mandate touches international relations. The notion is without precedent, and ominous in its implication that the Executive Branch can slip the congressional bridle by making agreements with other nations.

ARGUMENT

I. SYSTEMATIC DEFIANCE OF THE IWC MORATORIA IS A PER SE DIMINISHMENT

A. The Executive Branch Is Not Above the Law Just Because Its Action Affects Foreign Affairs

Justice Jackson said that the foreign affairs authority of the Executive Branch is "at its maximum . . . [when done] pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). It

enactments affecting foreign affairs are nonjusticiable. Second, they have suggested that even if such statutes are justiciable, they should be denied the benefit of the ordinary rules of statutory construction. The Court should recognize the pernicious nature of these theories and the far-reaching harm to our system of government which could ensue from their acceptance. The House amici urge the Court to uphold the powers and dignity of both the Legislature and the Judiciary by categorically rejecting these novel theories.

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